In The

Supreme Court of the United States

October Term, 1978

No. 78-55

BROADWAY BOOKS, INC.

Appellant,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,

Appellees.

On Appeal from the Supreme Court of the Commonwealth of Virginia

MOTION TO DISMISS THE APPEAL AND AFFIRM THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

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PRELIMINARY STATEMENT

The appellees respectfully move this Honorable Court to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of Virginia entered in this case on April 10, 1978.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a memorandum opinion which is not reported, but is set out in the appendix of the Jurisdictional Statement, p. A. 24.

JURISDICTION

Appellant asserts jurisdiction under Section 28 U.S.C. § 1257(2).

I.

The Appeal Should Be Dismissed For Failure To Present A Substantial Federal Question.

The appellant sets forth basically two matters on this appeal. First, that the Virginia courts erred in not holding that the Virginia obscenity statutes, §§ 18.2-372 through -386 are void for vagueness and overbreadth. Such an issue does not present a substantial federal question in light of this Court's decision in *Miller* v. *California,* 413 U.S. 15 (1973), and companion cases.

Second, the appellant asserts that § 18.2-383 of the Virginia Code denies it equal protection in that this statute exempts certain museums of fine art, libraries, and institutions of higher learning supported by public appropriation from the provisions of Virginia obscenity laws. This question raises the issue of classification which is neither new nor novel. This Court has long held that one class may be treated in one manner and another class in a different manner. See *Caskey Baking Co.* v. *Virginia,* 313 U.S. 117 (1941); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). *Cf. Young* v. *American Mini Theatre, Inc.,* 427 U.S. 50 (1976) (Zoning Ordinances for "Adult" movie theaters, bookstores, and similar establishments). The appellees assert that this question fails to present a substantial federal question.

II.

The Judgment Of The Supreme Court Of Virginia Should Be Affirmed.

The appellant first asserts that it has standing to contest the constitutionality of § 18.2-383 which exempts certain

museums of fine art, libraries, and institutions of higher learning supported by public appropriation from the provisions of the Virginia Obscenity Law. It is uncontroverted that appellant is a private commercial, profit seeking enterprise (App. 8, 16). The Virginia obscenity statutes clearly apply to commercial enterprises such as appellant. Where a line can be clearly drawn between commercial and non-commercial conduct and it clearly appears that the prohibited activity is in the commercial area, the actor does not have standing to rely upon the hypothetical rights of those in the non-commercial zone in mounting an attack upon the constitutionality of a legislative enactment. *Breard* v. *Alexandria,* 341 U.S. 622 (1951).

The exempted entities do not engage in commercial competition with appellant and their exemption does not deprive petitioner of any profits or sales. Appellant, as well as other commercial enterprises of a similar nature, flourish within the Commonwealth of Virginia and the provisions of § 18.2-383 have no deterrent effect on legitimate expression and the appellant should not be permitted to assert the rights of third parties. See *Young* v. *American Mini Theaters, Inc., supra.*

Whether the Virginia courts were correct in finding that appellant had no standing to contest the constitutionality of § 18.2-383 is moot since the Virginia courts did in fact consider the merits of appellant's constitutional attack (App. 17-21).

Petitioner's basic attack upon § 18.2-383 is based upon an assertion that the exempted entities constitute an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment. The legislature is free to adopt any classification it deems appropriate to promote general welfare so long as the classification bears a reasonable rela-

tion to a proper legislative purpose. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland, supra; English* v. *Virginia Probation and Parole Board,* 481 F.2d 188 (4th Cir. 1973).

The evil which is sought to be eliminated by the Virginia obscenity statutes is the commercialization of obscene materials, which enjoy no constitutional protection. This demarcation between commercial and non-commercial conduct is natural, substantial and reasonable in light of the subject matter and the evil sought to be eliminated.

The validity of the exemptions under § 18.2-383 is further supported by this Court's decision in *Miller* v. *California, supra.* In *Miller,* this Court set down the guidelines for determining whether a work is obscene. One of the tests is whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The entities exempted by § 18.2-383 recognized this test since works having serious literary, artistic, political, or scientific value are generally housed in libraries, schools, and museums of fine art.

The appellant tries to buttress its argument by stating that a group of students at the University of Virginia, an institution supported by public apporopriation, exhibited commercially to the general public, for a fee, the motion picture *Deep Throat,* while simultaneously, in the City of Richmond, an individual was tried and found guilty under the obscenity statutes for distributing the same film. The appellant presented no evidence in this case, consequently

there is nothing upon which this Court can conclude that the motion picture shown in Charlottesville was in fact the same as the one shown in Richmond. Additionally, the film in Charlottesville was not sponsored by the University of Virginia, an exempt institution under § 18.2-383, and the students were subject to the same provisions of the Virginia obscenity law as is the appellant.

The appellant also asserts that §§ 18.2-372 through -386 are void for vagueness and overbreadth. In *Price* v. *Commonwealth,* 214 Va. 490 (1974), the Supreme Court of Virginia found that the Virginia obscenity statutes, as construed, prohibit only hard core pornography and were consistent with this Court's decision in *Miller* v. *California,* and companion cases.

CONCLUSION

For the foregoing reasons, the appellees submit that this Honorable Court should dismiss the appeal for the failure to present a substantial federal question or in the alternative affirm the judgment of the Supreme Court of Virginia since it is consistent with prior decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, counsel for the appellees in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on or before the 29th day of September, 1978, I mailed, first class postage prepaid, three copies of the foregoing to Burton Sandler, Suite 600, Towson Towers, 28 Allegheny Avenue, Baltimore, Maryland 21204, counsel of record for appellant.

JAMES E. KULP
Deputy Attorney General